4

FILE COPY

Office Supreme Court
FILED
FEB 6 19
CHARLES ELMORE CR

# Supreme Court of the United States

OCTOBER TERM 1934

---

The Stewart Dry Goods Company, . . . Appellant,
vs. No. 454
John B. Lewis, et al., . . . . . Appellees.
Fred Levy, et al., . . . . . Appellants,
vs. No. 455
John B. Lewis, et al., . . . . . Appellees.
J. C. Penney Company, . . . . . Appellant,
vs. No. 456
John B. Lewis, et al., . . . . . Appellees.
The Kroger Grocery & Baking Company, . Appellant,
vs. No. 457
John B. Lewis, et al., . . . . . Appellees.

---

BAILEY P. WOOTTON,
Attorney General of Kentucky.
S. H. BROWN,
Assistant Attorney General.
FRANCIS M. BURKE,
Assistant Attorney General.
Solicitors for Appellees.

LESLIE W. MORRIS,
Frankfort, Kentucky.
BATSON, CARY & WELCH,
Louisville, Kentucky.,
Of Counsel.

# TABLE OF CONTENTS


| | Pages |
|---|---|
| **STATEMENT** | 1–3 |
| **QUESTIONS INVOLVED** | 3 |
| **ARGUMENT** | 4–68 |
| I. **The Challenged Act Does Not Violate The Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution** | 5–44 |
| (a) The Rate Structure | 5–8 |
| (b) Rate Structure as Modified by Section 4 | 9–10 |
| (c) Appellants Have Failed to Sustain the Burden of Showing There is no Factual Basis for the Classification | 10–17 |
| (d) Relation of Sales to Profits | 17–24 |
| (e) The Challenged Act Equalizes the Tax Burden | 25–28 |
| (f) Advantages of Large-Scale Merchandising Firms over Their Small Competitors | 28–31 |
| (g) Classification Under the Equal Protection Clause | 32–44 |
| II. **The Challenged Act Does Not Violate the Interstate Commerce Clause of the Federal Constitution** | 45–49 |
| III. **The Challenged Act Does Not Violate the Bill of Rights nor Section 181 of the Kentucky Constitution** | 50–63 |
| (a) Confiscation | 50–58 |
| (b) Classification | 58–63 |
| IV. **Appellants' Brief Analyzed** | 64–68 |
| (a) Nature of the Tax | 64–65 |
| (b) Moore vs. State Board of Charities and Corrections, 239 Ky. 729, 40 S. W. (2d) 249 | 65–67 |
| (c) Theory upon Which the Act is Challenged | 67–68 |
| **CONCLUSION** | 68–69 |

## AUTHORITIES CITED


A

Pages

Alaska Fish Co. vs. Smith, 255 U. S. 44, 48 ..... 32, 43

American Sugar Refining Co. vs. Louisiana, 179 U. S. 89, 95 ..... 33, 35

Armour Packing Co. vs. Lacy, 200 U. S. 226 ..... 43

B

Bell's Gap R. Co. vs. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533 ..... 35, 42

Best Foods, Inc., vs. Welch, 34 Fed. (2d) 682 ..... 36

Board of Tax Commissioners vs. Jackson, 283 U. S. 527, 75 L. ed. 1248 ..... 14

Broden's Farm Products Co. vs. Baldwin, 79 L. ed. 130 ..... 10

Brown-Forman Co. vs. Kentucky, 217 U. S. 573, 54 L. ed. 887, 30 S. Ct. 578 ..... 34, 35

C

Campbell vs. California, 200 U. S. 85 ..... 42

Chapter 149, Sessions Acts, General Assembly of Ky., 1930 ..... 2

Child Labor Tax Case, 259 U. S. 20 ..... 33

City of Newport vs. Frankel, 192 Ky. 408, 233 S. W. 884 ..... 61

Clark vs. City of Titusville, 184 U. S. 329 ..... 36, 60, 61

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540 ..... 43

Cooley on Taxation, 4th Ed., Vol. 1, p. 717 ..... 44

E

Emert vs. Missouri, 146 U. S. 296 ..... 49

F

Fawcus Machine Co. vs. United States, 282 U. S. 375 ..... 67

Fox vs. Standard Oil Co. of New Jersey, Decided January 14, 1935 ..... 14, 31, 32, 58, 67, 68

G

Pages

Gordon vs. City of Louisville, 138 Ky. 442, 128 S. W. 327, 328 ..... 59, 62

H

Hager, Auditor, vs. Walker, 128 Ky. 1, 107 S. W. 254 ..... 63

L

Lawrence vs. State Tax Commission, 286 U. S. 276, 283, 76 L. Ed. 1102, 1107, 52 S. Ct. 556, 87 A. L. R. 374 ..... 11

Louis K. Liggett Co. vs. Lee, 288 U. S. 517, 77 L. Ed. 929 ..... 14, 33, 36

Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160 ..... 11

M

Magnano Co. vs. Hamilton, 292 U. S. 40 ..... 32, 33, 37, 41

Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283 ..... 42

McCray vs. United States, 195 U. S. 27, 56 ..... 33

McLean vs. Arkansas, 211 U. S. 539 ..... 42, 43

Merchants & Manufacturers Bank vs. Pennsylvania, 167 U. S. 461 ..... 67

Metropolis Theatre vs. City of Chicago, Etc., 228 U. S. 61 ..... 40, 41, 60

Michigan Central Railroad vs. Powers, 201 U. S. 245 ..... 66

Moore vs. State Board of Charities and Corrections, 239 Ky. 729, 40 S. W. (2nd) 349 ..... 46, 48, 56, 58, 59, 62, 65, 66

O

Ohio ex rel. Clarke vs. Deckenbach, 274 U. S. 392, 397, 77 L. Ed. 115, 120, 47 S. Ct. 630 ..... 11

Ohio Oil Co. vs. Conway, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310 ..... 11

P

Pages

Penney Stores, Inc., vs. Mitchell, 59 Fed. 2nd. 789 — 36

Potter vs. Dark Tobacco Growers' Co-Operative Assn., 201 Ky. 441, 257 S. W. 33, 35 — 48

Q

Quong Wing vs. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192 — 33, 35, 43

R

Radice vs. New York, 264, U. S. 292, 68 L. Ed. 690, 44 S. Ct. 325 — 11

Rast vs. Van Deman & L. Co., 240 U. S. 342, 60 L. Ed. 679, 36 S. Ct. 370, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455 — 11, 35

Royster-Guano Co. vs. Virginia, 253 U. S. 412 — 42

S

Shanks vs. Kentucky Independent Oil Co., 225 Ky. 303, 8 S. W. (2nd) 383 — 65

Southwestern Oil Co. vs. Texas, 217 U. S. 114, 126 — 33, 35

Sproles vs. Binford, 286 U. S. 374, 394 — 33

State Tax Commissioners vs. Jackson, 283 U. S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 73 A. L. R., 1464, 75 A. L. R. 1536 — 12, 33, 34, 35

Stebbins vs. Riley, 268 U. S. 137 — 42

Stephenson vs. Binford, 287 U. S. 251 — 33, 43

Stewart Dry Goods Co. vs. Lewis, et al., 287 U. S. 9 — 2

Stewart Dry Goods Co., et al., vs. Lewis, et al., 7 Fed. Sup. 438 — 2, 9, 18, 22, 45

Strater Brothers Tobacco Co. vs. Commonwealth, 117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717 — 59, 60, 63

U

United States vs. Moore, 95 U. S. 760 — 67

W

Watson vs. Comptroller, 254 U. S. 122 — 42

# Supreme Court of the United States

OCTOBER TERM 1934

---

THE STEWART DRY GOODS COMPANY,
*Appellant,*

No. 454 vs.

JOHN B. LEWIS, ET AL.,
*Appellees.*

FRED LEVY, ET AL.,
*Appellant,*

No. 455 vs.

JOHN B. LEWIS, ET AL.,
*Appellees.*

J. C. PENNEY COMPANY,
*Appellant,*

No. 456 vs.

JOHN B. LEWIS, ET AL.,
*Appellees.*

THE KROGER GROCERY & BAKING COMPANY,
*Appellant,*

No. 457 vs.

JOHN B. LEWIS, ET AL.,
*Appellees.*

---

## STATEMENT

The above styled cases are before this Court for the second time. Upon the first hearing the District Court entered a decree dismissing the bills of complaint on the sole ground that complainants had an adequate remedy at

law under section 10 of the challenged act. The decree was reversed by this Court and the causes were remanded for further proceedings consistent with the opinion. Stewart Dry Goods Company vs. Lewis, et al., 287 U. S. 9.

Upon a return of the cases the District Court found that the remedy at law was inadequate, but sustained the validity of the act and entered a decree dismissing the bills of complaint on the merits. 7 Fed. Sup. 438. (Opinion, Dawson, J., Kroger R. p. 106.)

Appellants prosecute these appeals from judgments dismissing their bills of complaint which challenged the validity, on Federal and State constitutional grounds, of the Kentucky Gross Sales Tax Law of 1930. (Chapter 149, Sessions Acts, General Assembly of 1930, p. 475.)

Appellants represent four different types of merchants affected by the provisions of the act and prosecute these actions as such. In addition to the four appellants, fifteen merchants have come under the protection of the interlocutory injunction as intervenors. The following is a list of appellants and intervenors and their classification:

| Name | Type of Merchant |
|---|---|
| **APPELLANTS** | |
| The Stewart Dry Goods Co. | 1 department store |
| J. C. Penney Co. | 21 department stores |
| Levy Brothers | 1 department store |
| The Kroger Grocery & Baking Co. | 289 grocery stores |
| **INTERVENORS** | |
| Kaufman-Straus Co. | 1 department store |
| H. P. Selman | 1 department store |
| J. Bacon Company Sons | 1 department store |
| Montgomery Ward & Co. | 7 department stores |
| Sears-Roebuck & Co. | 3 department stores |
| Ben Snyder, Inc. | 1 department store |
| Lerman Brothers | Group of department stores |
| Byck Bros. & Co., Inc. | 1 specialty store and 1 leased dept. |
| S. S. Kresge Co. | 10 five and ten cent stores |
| F. W. Wolworth Co. | 19 five and ten cent stores |

| | |
|---|---|
| S. H. Kress Co. | 4 five and ten cent stores |
| The Great Atlantic & Pacific Tea Co. | Grocery stores |
| Melville Shoe Corporation | 8 shoe stores |
| Hook Drug Co., Inc. | 5 drug stores |
| Walgreen Drug Stores | 4 drug stores |

Thirteen of the nineteen merchants protected by the interlocutory injunction operate more than one store.

The Court made findings of fact and conclusions of law pursuant to Equity Rule 70½. (Kroger R. p. 143–152.)

## QUESTIONS INVOLVED

Appellants have designated eight points to be relied upon in the Kroger case, and four points in the Stewart case. (Kroger R. pp. 475–476; Stewart R. pp. 413–414.) The assignment of errors presents but four questions. However, appellants have abandoned their claim that the challenged act is violative of the due process clause of the Fourteenth Amendment, leaving three questions to be considered, as follows:

I. The challenged act is violative of the equal protection clause of the Fourteenth Amendment for the reason that the classification is unreasonable, arbitrary and has no rational basis.

II. The farm exemption provision of the challenged act violates the interstate commerce clause of the Federal Constitution.

III. The challenged act violates the Bill of Rights and Section 181 of the Kentucky Constitution.

## SUMMARY OF ARGUMENT

I. **THE CHALLENGED ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.**

(a) The Rate Structure.

(b) Rate Structure as Modified by Section 4.

(c) Appellants have Failed to Sustain the Burden of Showing There is No Factual Basis for the Classification.

(d) Relation of Sales to Profits.

(e) The Challenged Act Equalizes the Tax Burden.

(f) Advantages of Large-Scale Merchandising Firms Over Their Small Competitors.

(g) Classification Under the Equal Protection Clause.

II. **THE FARM EXEMPTION PROVISION OF THE CHALLENGED ACT DOES NOT VIOLATE THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.**

III. **THE CHALLENGED ACT DOES NOT VIOLATE THE BILL OF RIGHTS AND SECTION 181 OF THE KENTUCKY CONSTITUTION.**

(a) Confiscation.

(b) Classification.

IV. **APPELLANT'S BRIEF ANALYZED.**

# ARGUMENT

## I

## The Challenged Act Does Not Violate The Equal Protection Clause of The Fourteenth Amendment to The Federal Constitution

### (a) The Rate Structure

The challenged act imposes a license tax on retail merchants doing business in the Commonwealth of Kentucky, graduated in amount from 1/20 of 1% to 1% according to the volume of business transacted in each year.

It is charged repeatedly by appellants in their brief that the rate structure fixed by the act is discriminatory and that appellants and intervenors are required to pay a tax of 1% on their gross sales while their independent competitors are completely exempt from the payment of any tax. Section 2 imposing the tax and fixing the rates follows:

> "Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:
>
> "One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not

exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars."

(Kroger R. p. 109.)

Notwithstanding appellants' charge of discrimination, the language of the act is clear that all members of the same class within the same graduated levels are treated impartially and subjected to the same rate of taxes. It is the increased volume in each of the classes that is taxed at the increased rate and not the total amount of sales. Every merchant affected by the act, regardless of the amount of his sales, has the same privileges under the act with respect to the graduated scale. The appellant Kroger Grocery & Baking Company is taxed on the first $400,000.00 of its sales at exactly the same rate as every other merchant. In ascertaining the effective rate of the tax, consideration must be given to sales under a million dollars at the lower rates.

From a casual reading of the levying section, supra, it would appear that the graduations in the act are somewhat steep. Actually, this is not true, as is clearly demonstrated by Walradt exhibits C and D. (Kroger R. pp. 465–470A.) The effective rate is graphically shown by Walradt exhibits B and D. (Kroger R. pp. 464B–470A.) These exhibits show clearly that the effective rate imposed by the challenged act increases less rapidly than the graduated rate imposed by the 1918 Federal Income Tax. The effec-

tive rate imposed by the challenged act as compared to the effective rate imposed by similar laws of the States of Minnesota, New Mexico and Vermont is shown graphically by Martin exhibit 18. (Kroger R. p. 528A.) It is clearly shown that the graduation imposed by the Kentucky act is far less drastic than that imposed by other States.

To find the effective rate of the tax on a given amount of gross sales it is necessary to divide the total tax due by the amount of the sales. This gives the rate of tax, which is known as the effective rate. Appellants have consistently ignored this fact and, as shown both by arguments of counsel and in much of the evidence introduced by them, have thought only in terms of the highest rate applicable without regard to the fact that the effective rate was in reality much lower. For example, appellant Levy Brothers in its bill of complaint (Levy R. p. 19), alleges it will be taxed 1%, when as a matter of fact the record discloses it has annual sales of approximately one million dollars per year and would be required to pay a tax of .305%. (Walradt exhibit G, Kroger R. p. 474.) Walradt exhibit C, (Kroger R. pp. 465–469), shows the tax does not reach ½ of 1% until gross sales exceed $1,390,000.00 and does not reach ¾ of 1% until gross sales amount to $2,800,000.00. The lower Court found the claim of appellants and intervenors that they were being subjected to a 1% tax was not supported by the record. We quote the following from the opinion of the Court, which recognizes the effective rate:

> "Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00 of gross sales 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effec-

> tive rate gradually approaches, although it can never quite reach, one per cent, due to the fact that the taxpayer in the higher bracket gets the benefit of the application of the lower rates to that part of his gross sales which falls within the lower classifications."
>
> (Kroger R. p. 117.)

The effective rate is also shown under findings of fact No. 5 relative to the Fourteenth Amendment. (Kroger R. p. 145; Stewart R. p. 396.)

Our position that no merchant affected by the act will be required to pay a tax in excess of 85/100 of 1% is sustained by the testimony of Albert H. Morrill, President of the Kroger Grocery & Baking Company. (Kroger R. p. 379.) As the opinion of the lower Court shows, the tax can never reach a full 1%.

The changes in the effective rate of the tax as gross sales increase by $100,000.00 are small, the largest increase being only 632/10,000 of 1%. This occurs in the increase of gross sales from $1,000,000.00 to $1,100,000.00. After sales reach $2,500,000.00 there is a flattening out of the rate of increase as shown graphically in Walradt exhibits D, E, F and G. (Kroger R. pp. 470A–475.) Walradt exhibit A, (Kroger R. p. 464A), plots the effective rate as computed in exhibit C, (Kroger R. pp. 465–469), so as to show the degree of progression. We have compared the effective rate of the act with the Federal Income Tax of 1918, and with progressive taxes levied by three other states, and have found the comparison favorable to the challenged act in that the rates levied are not so sharply progressive as those levied by the Federal Government nor those levied on gross receipts in other states. The State of Maine has imposed a graduated tax on the gross receipts of railroads since 1881. (Kroger R. pp. 459–460.)

## (b) Rate Structure As Modified By Section 4

Appellants complain that practically all merchants in the class having sales of less than $400,000.00 are exempt from the payment of any tax by reason of the credits allowed by section 4 and that this section favors those merchants who pay special license or excise tax as against those taxpayers who pay no special license or excise taxes. This complaint was completely and convincingly answered by Judge Dawson of the District Court:

> "It is vigorously urged upon us that the provision of section 4 of the act which allows a credit to the extent of special license, excise, occupational or corporation license taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his corporate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the act under consideration. If there are any retail merchants affected by this act who, prior to its enactment, were not required to pay any special license taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where

> they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes."
>
> (Kroger R. p. 114.)

There is no showing that appellants and intervenors do not pay special license taxes for which they are entitled to take credit under section 4. The Kroger Company alleged in its amended bill of complaint that for the year 1930 it paid special State license, excise, occupational and corporation license taxes amounting to $15,369.00, being an average of $53.18 for each of its stores; for the year 1931 it paid $15,643.84, being an average of $61.59 for each store; and for the year 1932 it paid $12,271.75, being an average of $49.28 for each store. (Kroger R. p. 83.) This credit lessens the tax burden about which the appellant Kroger complains so bitterly, yet it complains that the act is invalid because of the credits. The Kroger Company and the other appellants and intervenors get the same credits their independent competitors get, all taxpayers being treated impartially and given the same treatment under the act.

### (c) Appellants Have Failed to Sustain The Burden of Showing There Is No Factual Basis for the Classification

If a state of facts can reasonably be conceived to sustain the classification made by the Legislature then there exists a presumption of the existence of such facts and one who assails the classification must carry the burden of showing that the challenged classification is arbitrary.

> Broden's Farm Products Co. v. Baldwin, 79 L. ed. 130.

Mr. Chief Justice Hughes, speaking for the Court, on page 135 says:

> *"When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.* Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160, supra; Ohio ex rel Clarke v. Deckebach, 274 U. S. 392, 397, 71 L. ed. 1115, 1120, 47 S. Ct. 630; Lawrence v. State Tax Commission, 286 U. S. 276, 283, 76 L. ed. 1102, 1107, 52 S. Ct. 556, 87 A. L. R. 374."
>
> (Italics ours.)

Continuing the opinion, the Court recognized in the following language the principle that the State has a broad discretion in fixing classification:

> "The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court."

Continuing, the Court says:

> "Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. Lindsey v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337 Ann. Cas. 1912C, 160 ,supra; Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Ohio ex rel. Clarke v. Deckenbach, 274 U. S. 392, 71 L. ed. 1115, 47 S. Ct. 630, supra; Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. ed. 775, 50 S. Ct. 310; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, S. Ct.

540, 73 A. L. R. 1464, 75 A. L. R. 1536. But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

It was incumbent upon appellants to show that the classification embodied in the challenged act was arbitrary and without a rational basis. This they failed to do, as disclosed by an examination of their evidence, much of which was presented in the form of affidavits. The Court will observe at once that the chief endeavor of appellants was to establish that the chain stores and other large scale merchandising firms, such as appellants and intervenors, have no advantages over independent or single unit stores. The affidavit of R. W. Lyons, Executive Vice-President of the National Chain Store Association, is typical of the affidavits presented by appellants. We quote from the Lyons affidavit:

> "The chain store system of retail merchandising does not present any inherent or fundamental advantages over the single store unit of merchandising. * * * * The fundamental requirements of successful merchandising which apply equally and are available equally to 'chain store' and single stores of 'individual merchants' are as follows:" etc.
>
> (Kroger R. p. 171.)

To illustrate the theory upon which appellants base their claim that the classification is arbitrary, we quote further from the affidavit of this winess:

> "There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination of competition in the retail grocery field will indicate the fallacy of such reasoning. The 'chain stores' were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientific management into the field of retailing, 'chain stores' had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as 'voluntary chains.' Such organizations perform for their members much the same function performed by the regular 'chain stores' in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-called 'voluntary chains' of independent retailers, comprising more than 60,000 retail stores. A number of such 'voluntary chain' store organizations operate in the State of Kentucky, among which are the following:
>
> Independent Grocers' Alliance.
> Associated Community Stores.
> James Grocery Co.
> Ohio Valley Grocery Company.
> Merchants Wholesale Grocery Company.
> National Grocery Company.
>
> "The advantages derived by membership in the 'voluntery chain' are practically identical with the advantages enjoyed by the regular 'chain store.' Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called 'voluntary

> chains' are able to purchase their supplies on an equal footing with any existing competition. The development of the 'voluntary chain' has made it possible for the jobber to materially reduce his handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailers in the form of reduced prices, dividends or bonuses."
>
> (Kroger R. pp. 174-175.)

Appellants present the affidavits of some thirty witnesses who held some position with the appellants or the intervenors. Their affidavits may be found in the Kroger Record, pages 169 to 355. Practically all of these witnesses state that the chain store organizations have no advantages over their independent competitors and the voluntary chains have the same advantages as the "integrated chains." They all state that the tax imposed upon appellants and intervenors is 1% of their gross sales. The appellants have attempted to make the same defense in this action as has been made in the chain store cases which have reached this Court. A complete answer to their defense is found in the opinions of this Court in the cases of:

> Fox v. Standard Oil Co. of New Jersey,
> Decided January 14, 1935
>
> Louis K. Liggett Co. v. Lee,
> 288 U. S. 517, 77 L. ed. 579
>
> Board of Tax Commissioners v. Jackson,
> 283 U. S. 527, 75 L. ed. 1248.

It is being generous with the witnesses who made these affidavits to say this record clearly shows they had no regard for the truth when they stated there was no difference between the chain store organizations and their independent competitors and that the tax imposed by the challenged act upon appellants and intervenors amounted to

1%. To illustrate the fallacy of the position of appellants we call the Court's attention to the affidavit of Dann Byck, general manager of Byck Brothers & Company, who have annual sales of approximately one million dollars. We quote from his affidavit:

> "This 1% tax which is imposed upon us and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell us in their particular line and take away our business without subjecting themselves to the tax."
>
> (Kroger R. p. 326.)

As a matter of fact, Byck Brothers will only be called on to pay a tax of .14%. This is shown by the Court's findings of fact No. 21, relative to the Fourteenth Amendment, which we quote:

> "21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under the Act, including the sales of this department, the tax of Byck Brothers is approximately 14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages."
>
> (Kroger R. p. 150.)

Turning to the evidence of appellants by deposition, we find but two witnesses were presented. They are Albert H. Morrill and Harry W. Schacter. (Kroger R. pp. 375–448H.) Mr. Morrill, who is President of the

Kroger Grocery & Baking Company, proceeds very much on the same theory as appellants' witnesses who testified by affidavit, that there is no difference between the chain store organization and the independent merchant. (Kroger R. pp. 385–386.) In addition to this he takes issue with the contention of appellees that increased sales result in increased profits by saying "profits tend to decrease with increased sales." (Kroger R. p. 383). His statements represent his conclusions and we submit that he does not testify to any statement of fact and does not present any concrete evidence from operating statistics of merchandising firms, or any other evidence, to support his statement that "profits tend to decrease with increased sales," and his statement that "increased sales has no necessary relation to net profits". Much of his evidence has to do with the history of the Kroger Company and the efficiency methods practiced by his organization and other large merchandising firms. While he states there is no difference between the methods employed by his organization and the methods employed by his independent competitors, we find he contradicts himself when he describes the efficiency methods employed by large retailing firms. Although he categorically denies that large retailing firms enjoy any competitive advantages over their small competitors he destroys the effect of his denial when he goes into detail in describing the methods employed by his firm and others similarly situated. For example, he testifies at length about the value of efficient management. It is true that management plays an important part in the success of any business and it is also a matter of common knowledge that large retailing firms can and as a matter of fact do hire the most efficient merchandising experts, the best buyers, and the best advertising managers. His statement that profits tend to decrease with increased sales is in direct contradiction with the established facts appearing in this record and as recognized by all students of economy. It is also a fact within the knowledge of all men that if profits

decreased with increased sales, then large scale merchandising would cease to exist. There is no more factual basis for this statement than there is for the statement that the integrated chain store has no advantage over the voluntary chain. (Kroger R. pp. 385–386.)

What we have said as to the testimony of Mr. Morrill is applicable to the evidence of Mr. Schacter.

We submit that appellants have failed to offer any legitimate proof to rebut the legislative presumption supporting the classification in the challenged act. Appellees' contention that the classification is reasonable may be sustained upon the following grounds:

(d) Increased volume of sales results in increased profits.

(e) Large scale merchandising firms, such as appellants, pay relatively less tax for state and local purposes than do their small competitors.

(f) Large scale merchandising firms have an advantage over their small competitors in standardization of equipment and display, superiority and uniformity in store management, rapid turnover and unified sales policy.

## (d) Relation of Sales to Profits

The appellees take the position that the classification made by the challenged act may be sustained alone upon the ground that increased volume of sales results in increased profits. We sustained this proposition by the evidence of economists and by actual operating statistics of merchandising firms. Appellants, of course, disagree with this proposition and contend there was no relation between increased sales and profits. They present nothing to sustain their contention and, as we will later point out, in fact sustain appellees.

Judge Dawson, writing the opinion for the Court, in discussing this controversy and as to whether or not it presented a reasonable foundation for the classification, used this language:

> "There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because, generally speaking, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the 'purposes and policies of taxation,' or that such classifications precludes the assumption that it was in good faith exercise of legislative judgment and discretion?"

(Kroger R. pp. 113-114.)

Professor Martin presented exhibits I to VII to sustain his evidence. (Kroger R. pp. 491–494.) These exhibits deal with different classes of retailing establishments. Exhibit I shows that stores having sales of less than five hundred thousand dollars earn profits of 2.8%; stores with sales ranging from five hundred thousand to two million dollars earn 3%, and stores having sales in excess of two million dollars earn an average profit of 5.2%. Professor Martin in analyzing Exhibits II, III, IV and V, said:

> "Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In

1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

"Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owned capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

"Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

"Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail specialty stores scattered over the United States. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

"Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independ-

ent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

"Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale."

(Kroger R. pp. 482-483.)

Appellants sought to belittle and destroy the effect of Dr. Martin's evidence, together with the operating satistics submitted by him, by introducing Harry W. Schacter, President of the Kaufman-Straus Company, one of the intervenors. His attention was called to the affidavits of Professors Walradt, Martin and Phelps, showing the relation of profits to sales and the return on invested capital, to which he replied:

"That might be correct theoretically but all the supporting facts and figures from actual experience of department stores indicated that there was no relationship."

(Kroger R. p. 437.)

This witness in discussing his theory of economics, apparently evolved by himself and wholly unsupported by any other evidence, undertakes to sustain his statement that

there is no relationship between profits and increased sales by a discussion of what he calls the "interquartile range." The witness, however, contradicts his statement just quoted that there was no relationship between increased sales and profits in discussing Dr. Martin's Exhibit No. I, when he makes this statement:

> "Professor Martin again quotes average figures and leaves out the interquartile ranges quoted in this table. For example, the increase in percentage of net worth of stores doing less than a million is 8.9%, whereas in stores doing over a million dollars in sales, the increase in net worth is 15.5%"
>
> (Kroger R. p. 441.)

Here the witness admits that table 34, page 45, of Bulletin 78 of the Bureau of Research of Harvard University shows the average increase in percentage of net worth of merchants having sales of less than one million dollars is 8.9%, whereas in stores having over a million dollars in sales the increase of net worth is 15.5%. The witness then proceeds to discuss the interquartile range by showing that stores having sales of less than one million dollars had a range of profit of from 3.20% to 20.75% and stores having more than one million dollars in sales have an interquartile range of from 10.64% to 20.35%. We submit that this admission on the part of the witness sustains our theory. He overlooks the fact that while some stores in the less than million dollar class had an increased percentage of net worth of 20.75%, the average of this class is 8.90%; and likewise overlooks the fact that the lowest percentage of stores with sales in excess of one million dollars is 10.64%, while the lowest in the first class earn only 3.20%.

The majority opinion of the lower court points out very clearly and correctly that the Legislature in levying a tax is not required to make inquiry as to whether the

taxing statute will impose a tax upon some business that is making little or no profit. We quote from the opinion:

> "The test is, what is its effect generally upon the class taxed or what is the effect generally upon any branch or subdivision of that class."
>
> (Kroger R. p. 117.)

To further illustrate the fallacy of the appellant's contention that there is no relation between increased sales and profits, we quote from the evidence of the witness Schacter with reference to Martin Exhibits IV and V:

> "Attention of the witness was then called to Martin Exhibits 4 and 5 and to page 8 of Bulletin 83 of the Bureau of Business Research of Harvard University on the operating results of department stores in 1929. His attention was also called to pages 20 and 28 of the same bulletin. The witness thereupon testified that the percentage of gain to net worth, according to Professor Martin's figures indicated that he again used the average figures all the way down the line and omitted the interquartile ranges. For stores doing less than $500,000 Martin showed a percentage of gain to net worth of 5.7%. For stores doing $500,000 to $2,000,000 of business he showed a percentage of gain to net worth of 7.5% and for stores having sales in excess of $2,000,000 he showed a percentage of gain to net worth of 8.5%."
>
> (Kroger R. p. 442.)

The witness here admits that the figures used by Professor Martin show he used average figures. The witness does not challenge the correctness of the precentages of gain to net worth shown by Exhibits IV and V, but again reverts to his interquartile range argument, showing that some merchants having sales of less than $500,000 had a larger percentage of net gain than merchants having sales in excess of $2,000,000.

The figures in the exhibits which we have discussed related to the years 1927, 1928 and 1929. Professor Martin in giving his deposition on the final hearing supplemented the information shown in Exhibits I to V, which we have discussed, by Exhibits I-A, II-A, II-B, IV-A and V-A. (Kroger R. pp. 531-533.) Professor Martin, to show the correctness of the statement contained in his original affidavit, which we have discussed and which was criticized by Mr. Schacter by injecting his interquartile range theory, presented Exhibit XIX, (Kroger R. p. 528B), putting the testimony of Mr. Schacter in graphic form. In discussing this exhibit the witness said:

> "The witness was thereupon asked the significance of Exhibit 19 and replied that in his affidavit filed in 1931 the data given in the line marked 'Average' were incorporated as part of the affidavit. The evidence presented by Mr. Schacter made a good deal of comment on the fact that there was omitted from the witness's original testimony the data respecting the interquartile range. Witness thought it would be convenient for the court to put the testimony of Mr. Schacter in graphic form. The exhibit means, the witness stated, that the average percentage, that is, the average net gain as a percentage of net worth is indicated in the middle line. The solid line in the chart and the middle fifty per cent of the cases arrayed according to the rate of earnings on net worth are shown between the dotted lines, the middle fifty per cent being the interquartile range that Mr. Schacter referred to. This graph showed, the witness stated, that the middle fifty per cent of the cases arrayed with respect to earnings of the department stores moved very much as the average moved. In other words, the earnings on the invested capital in the case of the smaller enterprises is relatively lower and that on enterprises of intermediate size considerably higher, and that on enterprises of very large size in the department store business it is even larger than the earnings on the intermediate class. The witness stated that it did not seem worthwhile to prepare an exhibit to show the earnings

> on net sales but from his general investigation it would be about the same in general character. The witness also stated that in preparing his chart he did not use the data used by Mr. Schacter but he drew it from the original source."
>
> (Kroger R. pp. 508–509.)

The witness filed with his depositions exhibits XVII to XXXI, (Kroger R. pp. 525–542A), in which he demonstrates by charts, graphs and tables the correctness of his evidence that increased sales result in increased profits. His evidence explaining these various exhibits is found on pages 508 to 521, Kroger Record. The evidence presented here shows conclusively there is no basis for the oft-repeated assertion in appellants' brief that the classification in the challenged act was discriminatorily and arbitrarily made; it establishes conclusively that the classification was a "good faith exercise of legislative judgment and discretion."

The lower Court under findings of fact relative to the Fourteenth Amendment, No. 10, recognized that appellees had sustained their claim that increased volume of sales results in increased profits and increased ability to pay taxes. Finding No. 10 follows:

> "10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions."
>
> (Kroger R. p. 147.)

## (e) The Challenged Act Equalizes The Tax Burden

The State of Kentucky and its various political subdivisions have relied largely on the ad valorem system of taxation, as a consequence of which appellants and others similarly situated have not borne their fair portion of the tax burden. The challenged act equalizes that burden. Prior to the passage of the act each dollar of gross income received by large merchants was taxed less than each dollar received by a small merchant. This is shown in Martin's exhibit IX, (Kroger R. p. 497; Stewart R. p. 197). Professor Martin in discussing the facts shown by the exhibit said:

> "As plaintiffs have urged in their petitions, rate of turnover is a significant fact in retailing efficiency. That merchant who secures the highest rate of turnover, other things remaining the same, will enjoy the most profitable business. Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.
>
> "That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store."
>
> (Kroger R. pp. 484–485.)

In discussing the facts shown by exhibit IX relating to different classes of retail stores, the witness said:

> "Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one."
>
> (Kroger R. p. 486.)

In concluding his evidence showing that large scale merchandising businesses, such as appellants and intervenors enjoy greater tax-paying ability in proportion to amount of business than their small competitors, the witness said:

> "On the basis, then, of the information available, it is fair to say that, not only does the the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.
>
> "One other point in this connection should be made. Exhibit XI indicates that, taking the country

as a whole, the tax burden resting on the department store tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a cooperative or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales."

(Kroger R. p. 487.)

The evidence of Professor Martin is supported by the evidence of Professor Walradt, from which we quote:

"There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that in addition to the general property tax some other form of tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose."

(Kroger R. p. 461.)

Professor Phelps agrees with Professors Martin and Walradt. We quote from his evidence:

"Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field of economics that there are important economies in large scale production and large

scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

(Kroger R. p. 544.)

These three witnesses who have testified that large scale merchandising firms pay less taxes on each dollar of their gross income than do their small competitors are economists and qualified to testify on the subject discussed. The evidence of these witnesses which we have quoted stands in this record uncontradicted. The appellants do not take issue with the facts disclosed by them.

We submit that the classification in the challenged act may be sustained alone upon the ground that appellees have established as a fact that appellants and intervenors pay less tax on each dollar of gross income than their small competitors.

### (f) Advantages of Large-Scale Merchandising Firms Over Their Small Competitors

Appellants and intervenors in their anxiety to escape the force of appellees' contention that increased sales result in increased profits and as a result large scale enterprises have greater tax-paying ability than their small competitors have fallen into their own trap. They presented as witnesses such merchandising experts as Robert W. Lyon, Executive Vice-President of the National Chain Store Association, Albert H. Morrill, President of the Kroger Grocery & Baking Company, Harry W. Schacter, President of the Kaufman-Straus Company, and Robert J. McKim, President of the Stewart Dry Goods Company, who attributed the success and profits of large merchants to efficient management instead of increased sales. Mr. Morrill states:

> "The difference insofar as profits were concerned was not due to territory but to management. That is the entire thing in a grocery business."
>
> (Kroger R. p. 381.)

After discussing the relation of sales to profits, he said:

> "It comes back again to the question of management and this is peculiarly so in the retail distribution of food stuffs through stores."
>
> (Kroger R. p. 383.)

In discussing business conditions after the "crash" which occurred in October 1929, he said:

> "Many of the larger companies got into the red and went into the hands of Receivers. A large number of the smaller grocery chains also went into Receivership and their assets melted away."
>
> (Kroger R. p. 382.)

Following this statement the witness named several of the small chains that failed and went out of business. He only gives one example of a large grocery chain that went into receivership. On cross examination he was asked to name a number of the large chain stores, which he did. He then stated:

> "None of the larger firms mentioned have failed or gone into the hands of receivers, for the most part the failures having been among the smaller chains in the grocery line."
>
> (Kroger R. p. 390.)

In discussing the mortality rate among individual merchants, the witness admitted that:

> "According to figures shown by the Louisville Grocery Survey, the mortality rate among individual groceries was 100% every three and one-half years."
>
> (Kroger R. p. 391.)

The witness states his training and experience, showing he has given all of his time to the Kroger Company since he became president; that he had visited foreign countries, studying their bookkeeping, delivery, warehousing

methods and everything connected with the business. (Kroger R. p. 376.) He said:

> "Kroger trains its men, having regular training schools and diplomas."
>
> (Kroger R. pp. 384–385.)

What small competitor of the Kroger Grocery & Baking Company, Stewart Dry Goods Company, and the other appellants and intervenors is able to secure the expert management such as appellants and intervenors have shown they have? The appellants have made out a case for appellees by showing that large retail merchants are able to and do secure those who are most efficient by training and experience to manage their enterprises. Expert management, as shown by Mr. Morrill, does not apply alone to the head of the enterprise,—the entire organization is made up of trained experts such as salesmen and advertising managers. The lower Court recognized these facts as a basis for the classification in the challenged act under findings of fact Nos. 13 and 14, relative to the Fourteenth Amendment, which we quote:

> "13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.
>
> "14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management."
>
> (Kroger R. p. 148.)

It is established by the record in these cases that large business organizations return larger dividends to their stockholders than do their small competitors. The best evidence of this fact is that such organizations continue to grow and flourish. There have been instances where large business enterprises have failed, sometimes due to dishonest management, sometimes due to sudden economic

changes, sometimes as a result of both. Such failures are few and far between. The rule remains that in any given economic situation large business organizations can and do return larger dividends per dollar of capital invested than do their small competitors. What was said by Mr. Justice Cardozo on this subject in the case of *Fox* v. *Standard Oil Company of New Jersey, supra,* is applicable to the appellants and intervenors here. We quote from the Fox opinion:

> "We have here abundant capital; standardization in equipment and display; superior management; more rapid turnover; uniformity in store management; special accounting methods; and a unified sales policy coordinating the diverse units."

The challenged act does not violate the equal protection clause of the Fourteenth Amendment and the classification contained therein is not arbitrary, but may be sustained on the following facts shown by the record:

(1) All merchants in the same class within the same graduated levels pay the same rate of tax.

(2) Increased volume of sales results in increased profits.

(3) The challenged act equalizes the tax burden between large merchants and their small competitors.

(4) Large merchants have an advantage over their small competitors in the standardization of equipment and display, superiority and uniformity in management, more rapid turnover, and a unified sales policy.

Any one of the above reasons is sufficient to sustain the classification in the challenged act and the appellants have failed to rebut the presumption of the existence of such facts.

## (g) Classification Under The Equal Protection Clause

Few if any provisions of our Constitution have been invoked more times as a barrier to Federal and State legislation than the equal protection clause of the Fourteenth Amendment. This Court has repeatedly held that the equal protection clause does not require abstract equality and uniformity in State excise, privilege or occupational taxes. All that is required is that the tax apply equally and uniformly to all persons similarly situated. The most recent case on this subject before this Court is that of Fred L. Fox v. Standard Oil Company of New Jersey, decided January 14, 1935. This case involved the validity of an act of the West Virginia Legislature imposing a license tax graduated according to the number of stores, ranging from $2.00 on one store to $250.00 on all stores in excess of 75. Stores were divided into nine classes. The entire tax for the year 1933 amounted to $569,693.00. Of this amount the Standard Oil Company paid $240,173.00, or 42.16% of the total tax under the act. Five oil companies paid $476,-171.00, or 83.5%. These five companies had less than 5% of the gross sales of all merchants taxed by the act. The Standard Oil Company challenged the act, claiming the statute in its application to it and others similarly situated denied to them the equal protection of the law. Mr. Justice Cardozo, speaking for the Court in sustaining the act, said:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in Magnano Co. v. Hamilton, 292 U. S. 40, decided at the last term. 'Even if the tax should destroy a business, it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk.' Alaska Fish Co. v. Smith, 255 U. S. 44, 48, quoted in Magnano Co. v. Hamilton, supra, p. 46. True the reservation was made (292 U. S. at p. 44) that an act might be so arbitrary as not to be an exercise of

the taxing power at all, the form of a tax being a cloak for something else. Cf. Child Labor Tax Case, 259 U. S. 20. In respect of the challenged act, there is neither evidence nor even claim of any such abuse. On the contrary, the complainant has stated in its bill that the 'act is, in effect, a tax measure,' its validity or invalidity to be adjudged upon that basis. A chain, as we have seen is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of the component links; and the greater they become the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held, State Board of Tax Commissioners v. Jackson, supra; Liggett Co. v. Lee, supra. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. Quong Wing v. Kirkendall, 223 U. S. 59; American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95; Southwestern Oil Co. v. Texas, 217 U. S. 114, 126; Sproles v. Binford, 286 U. S. 374, 394; Stephenson v. Binford, 287 U. S. 251. In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. v. Hamilton, supra, whereby sales of butter were fostered and sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence. 'Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful powers are matters beyond the scope of judicial inquiry.' Magnano Co. v. Hamilton, supra, at p. 44; McCray v. United States, 195 U. S. 27, 56. The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anyhting we have written to

> declare it expedient or even just, or for that matter to declare the contrary. We deal with power only."

Appellants complain bitterly that the Kentucky tax is oppressive; that although appellants and intervenors have approximately 20% of the gross sales taxed by the act yet they will be called upon to pay 80% of the tax. It is apparent that the challenged statute in the case at bar is not anything like as oppressive as the West Virginia act sustained in the Fox case supra. They also charge that merchants in the highest bracket will be required to pay twenty times the tax their independent competitors in the lower bracket will be required to pay. This does not constitute a reason for declaring the challenged statute invalid, since merchants in the ninth class under the West Virginia statute are required to pay a tax of 125 times that paid by the merchants in the first class.

Recognizing the necessity of conceding to the legislative power of the State a wide discretion in the classification of trades, callings, businesses and occupations, the Court in the case of Brown-Forman Co. v. Kentucky, 217 U. S. 573, 54 L. ed. 887, 30 S. Ct. 578, said:

> "A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

This statement was quoted with approval in the case of Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. ed. 1248, in which case the Court added at page 1256:

> "It is not the function of this court in cases like the present to consider the propriety or justness of

the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation."

Reaffirming the principle that the equal protection of the law does not compel equal taxation, the Court in the same case said (at page 1255):

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the law does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578. *The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction,* American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Denman & L. Co., 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192."
>
> (Italics ours.)

The appellants presented considerable evidence as to the similarity of opportunities and advantages between appellants and intervenors and their small competitors and showing they were in direct competition with each other. Much of their brief is given to a discussion of this evidence, and contending these facts show the classification in the challenged act is arbitrary and denies to them the equal protection of the law. A complete answer to the conten-

tion of appellants on this point is the case of Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. Ed. 529. Mr. Justice Roberts, speaking for the Court said: (288 U. S. p. 533.)

> "Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed. It is needless to repeat what was said in the Jackson Case to the effect that the difference between the subjects taxed need not be great, and that if any reasonable distinction can be found the duty of the court is to sustain the classification embodied in the law."

It is true the Court in the cases quoted was dealing with chain store legislation, but as observed by the Court in the Jackson case, the principles which govern the decision of the case at bar are well settled. The principle upon which the chain store cases were decided is applicable to the case here. We quote from Syllabus 3, in the case of Best Foods, Inc. v. Welch, 34 Fed. 2d 682:

> "Any classification in state legislation reasonably founded in purposes and policy of taxation, and which has reasonable relation to some permitted end of governmental action, is permissible within equal protection clause of Const. U. S. Amend. 14."

As held in the case of Penny Stores, Inc. v. Mitchell, 59 Fed. 2nd 789. (Syllabus 3.)

> "Classification is primarily and conclusively for Legislature unless facts cannot reasonably be conceived to sustain it."

This Court has had occasion to deal with the propriety of the progressive features in license taxes based on volume in other than chain store cases. Clark v. City of Titusville, 184 U. S. 329, is directly in point. The City of Titusville, Pennsylvania, passed an ordinance imposing a license tax on retail merchants progressively increasing in

amount upon the volume of gross sales. The scale was as follows: (p. 330)

| Class | Business | Tax |
|---|---|---|
| 1 | Over $60,000.00 | $100.00 |
| 2 | $50,000 to 60,000 | 80.00 |
| 3 | 40,000 to 50,000 | 70.00 |
| 4 | 30,000 to 40,000 | 60.00 |
| 5 | 20,000 to 30,000 | 50.00 |
| 6 | 10,000 to 20,000 | 35.00 |
| 7 | 5,000 to 10,000 | 25.00 |
| 8 | 2,500 to 5,000 | 15.00 |
| 9 | 1,000 to 2,500 | 10.00 |
| 10 | 1,000 | 5.00 |

The ordinance was attacked upon the ground that the progressive scale was prohibitory and arbitrary, but this Court upheld it in the following language: (p. 331)

> "The objection that plaintiff makes to the ordinance is, that it classifies by amount or value with the result (1) that the lowest amount or value of property of a class 'is required to pay the same amount of taxes with the highest amount or value of property therein'; (2) that the differences are not in kind but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; (3) that the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.
>
> "Classification by amount came up for consideration and decision in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the discriminations which were claimed to have re-

sulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law in Illinois. We said: Our inquiry must be not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the Federal Constitution. The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.'

"The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:

"'On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars. Provided, that an estate in the above case, which may be valued at a less sum than five hundred dollars, shall not be subject to any duty or tax.'

"Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment of the

Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

"'If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not three per cent, on $10,000, and an increased percentage on the excess over $10,000, but an increased percentage on the $10,00 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of $10,000 and one dollar by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their legality has never been questioned.'

"Plaintiff in error, however, contends that the

tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States."

This Court has gone even further. In Metropolis Theatre v. City of Chicago, etc., 228 U. S. 61, it sustained the right of a municipality to impose a theatre license tax increasing with the amount of admission charged, on the theory that it was, after all, a tax on volume. The wording used is interesting: (p. 69)

"In other words, there is a natural relation between the price of admission and revenue, some advantage, certainly, that determines the choice. The distinction obtains in every large city of the country. The reason for it must, therefore, be substantial, and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it cannot be declared to be so palpably arbitrary as to be repugnant to the Fourteenth Amendment. This is the test of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as the Amendment is concerned, to declare in words, and the cases illustrate by examples, the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its

palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy."

There is no difference between the principles which govern the decision of the case at bar and the principles upon which this Court decided the cases of Metropolis Theatre and City of Titusville, supra. If the tax here involved had been 1/40 of 1% on the first $400,000 of sales and graduated on the same scale so that the maximum tax would be ½ of 1% it is doubtful if the validity of the act would have been challenged. The amount of the tax however does not make the act invalid. This is clear from Mr. Justice Sutherland's language in the case of A. Magnano Company v. Hamilton, 292 U. S. 39, 78 L. ed. 1109, from which we quote: (p. 1115)

"If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. * * *"

Judge Dawson in applying the facts in the case at bar to the well-settled principles discussed in all these cases found, the challenged act did not deny to appellants and intervenors the equal protection of the law. His language is so clear and convincing that we quote from his opinion:

(Kroger R. pp. 111-114.)

"It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of

the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

"It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classification further than that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation, as well as property taxation. *It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classification is reasonably founded on the purposes and policies of taxation. Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and discretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are*: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster-Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S.

122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

(Italics ours.)

"The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. *We think it safe to say that slight differences, such as inability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State Taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.*

(Italics ours.)

"Measured by these rules, we are unable to say that the Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled, and the plaintiffs concede, that classification for taxation based upon mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. *All those who fall exclusively within the* $400,000.00 *class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classi-*

*fications as is exacted of those taxpayers who fall exclusively within such lower classifications.*
(Italics ours.)

"Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

"Having in mind the principles heretofore adverted to, we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because generally speaking, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the "purposes and policies of taxation", or that such classification precludes the assumption that it was in the good faith exercise of legislative judgment and discretion?"

It is of no significance that the number of merchants who must pay the maximum rate on some part of their sales is small, since "a classification is not invalid because it affects one person or corporation alone where it is broad enough to apply to others if they exist." (Cooley on Taxation, 4th ed., Vol. 1, p. 717.)

## II

## The Challenged Act Does Not Violate The Interstate Commerce Clause of The Federal Constitution

Appellants' rather extended but absurd argument in support of their contention that the challenged act violates the interstate commerce clause of the Federal Constitution is fully answered by the opinion of the lower court. We quote from Judge Dawson's oipnion:

> "We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky. 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact can have no effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Traux v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does not apply to sales made in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other states and sold in this State."

(Kroger R. pp. 118-119.)

The above is a complete answer not only to every fair and logical argument that could possibly be made that the act violates the interstate commerce clause, but it is also a complete answer to the unfair and ill-founded criticism of the Kentucky Court of Appeals.

The case of Forrest Moore, et al., v. State Board of Charities and Corrections, et al., was orginally filed on the 22d day of December, 1930, prior to the filing of the bills of complaint by the appellants. The Moore case was filed and practiced in good faith for the purpose of obtaining from the Court of last resort of the State a construction of a new and untried law. Every argument that has been advanced in the cases at bar was advanced in the Moore case. In fact there was filed with the Court of Appeals a transcript of the record in the Kroger case containing all the pleadings, affidavits and exhibits filed and introduced in that case prior to its reversal by this Honorable Court. The Court also had the advantage of the large and voluminous briefs prepared by the able attorneys for appellants, and we submit that one has but to read the opinion in the Moore case to know that the Court of Appeals considered fully every angle of the case which has been presented in the cases at bar. We quote from that part of the opinion in the Moore case dealing with the question of interstate commerce, 239 Ky. 729, 40 S. W. (2d) 349:

> "Does the act violate the commerce clause of the federal Constitution?

"It is argued that it does, because in defining a retail merchant it exempts those 'actually engaged in gardening or farming and selling garden or farm products raised by them in this State.' Appellants say that under this definition the tax must be collected from those who raise their farm products elsewhere but bring them into this state to sell, which, being true, we have a tax laid on interstate commerce, a thing which the state cannot do. However, we are of the opinion that the phrase 'in this State' was

meant to modify the word 'selling' and not the word 'raised'. The whole import of the act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products. Such sales the Legislature intended to be without the operation of the act, and it was of no moment to that body where the produce sold was raised. We must always presume that the Legislature intended to write a constitutional act and must construe its law with that end in view. With this principle controlling us, and being convinced that it was the sale the Legislature had in mind and not the place of production, we conclude that the act must be construed as to exempt those engaged in gardening and farming and selling in this state their own products no matter where grown. With this construction placed upon the act, the criticism of its constitutionality based upon the ground now urged falls.'"

The Kentucky Court of Appeals having held that the challenged act does not violate the commerce clause of the Federal Constitution, all parties affected by said act are bound by that construction. The General Assembly in exempting farm products when sold by the producer from the operation of the act did not intend to do a vain and foolish thing. It is a well recognized rule that when a legislative act is susceptible of two interpretations,—one which makes it valid, the other invalid—the court will accept the interpretation which will sustain the act. Appellants have taken an absurd position when they say:

> "The construction of this clause adopted by the lower court exempts from the tax all of the sales of retail merchants selling farm products raised by them anywhere."

Neither the lower court nor the Kentucky Court of Appeals gave the challenged act any such construction. The Kentucky Court said:

> "It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products. Such sales the legislature intended to be without the operation of the act, and it was of no moment to the body where the produce sold was raised."

It is clear that the General Assembly had in mind farmers and gardeners who operate roadside markets for the sole purpose of selling farm and garden products raised by them. Certainly the Legislature did not intend to exempt the Kroger Grocery & Baking Company and the claim that such was the intention of the Legislature is ridiculous. To so construe the act would make it possible for every merchant within the State to escape the provisions of the act simply by engaging to some extent in the business of raising and selling farm products. Kroger's farming business is nothing but an advertising scheme. It owns and operates a farm of approximately three hundred acres in Ohio, known as the County Club Farm. This Court judicially knows that a farm of that size, no matter how efficiently operated, could produce but an infinitesimal part of the farm produce sold by Kroger. The Court also judicially knows that many of the farm products sold by Kroger could not be produced in Ohio because of the climate.

The appellants contend that if the act is construed to exempt farmers and gardeners the act is invalid because the classification is arbitrary. The Court of Appeals of Kentucky did hold that the Legislature by the challenged act intended to exempt farmers and gardeners. The Court said, however, that such a classification was valid. We quote from the Kentucky opinion:

> "We did not, in that part of this opinion dealing with the equal protection of the laws, discuss the exemption of farmers and gardeners from the operation of the act because it is settled that a classification such as this is valid. Thus in Potter v. Dark Tobacco Growers' Co-Operative Association, 201 Ky. 441, 257 S. W. 33, 35, we said:

"'The basis of this change in public opinion toward combination and classification is not in any sense political, but economic rather, and, in our judgment, it is because of basic economic conditions, affecting vitally not only the farmers, but also the public weal, that the classification based upon agricultural pursuits is reasonable, just, and imperative for the good of the entire nation and every citizen thereof.' "

The lower court's finding of fact No. 2, with reference to Interstate Commerce follows:

"2. The Kroger Grocery and Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky."

(Kroger R. p. 150.)

The court concluded as a matter of law that the decision of the Court of Appeals of Kentucky "as to the meaning and scope of the act in question is binding upon this court" and that "as the act had been interpreted and construed by the Court of Appeals of Kentucky in the Moore case it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiff."

It has been repeatedly held that the Interstate Commerce clause has no application to the sale of goods in a state when it appears that the goods were manufactured or grown in another state and shipped in quantity into the taxing state and there sold at retail by the manufacturer or producer. Emert v. Missouri, 146 U. S. 296.

## III

## The Challenged Act Does Not Violate The Bill of Rights Nor Section 181 of The Kentucky Constitution

### (a) Confiscation

The appellants and intervenors have cried "confiscation" from the institution of these cases four years ago until this good day. The evidence of their witnesses is a sufficient answer to the claim of confiscation. Turning to the record, the Court will find that Robert W. Lyons, Vice-President of the National Chain Store Association, testified that during the year 1930, the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales. (Kroger R. p. 173.) He added that smaller percentages of earnings resulted because of the established practice of department stores in accepting the return of unsatisfactory merchandise, and that well-managed companies in the retail grocery field "are able to earn on their large volume of sales only from 1½% to 2% net." (Kroger R. p. 173.)

John B. Bonham, Vice President of the Kroger Grocery & Baking Company, testifying by affidavit as to Kroger earnings, states:

> "Kroger has always built its business upon the policy of selling good food and merchandise to the consumer at the lowest possible prices. In order to accomplish this it has been necessary to sell a large volume of merchandise at a small margin of profit on individual items. The profit which plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price has averaged from 2% to 2½% of its gross sales."
>
> (Kroger R. p. 187.)

W. A. Steiden was for many years connected with the Piggly-Wiggly Valley Company and for the two years

prior to the time he testified by deposition was acting branch manager for the Louisville branch of the Kroger Company, having the general management, supervision, and control of 222 of its stores. He makes the following statement as to Kroger earnings:

> "The profits which we endeavor to make from store operation in the branch over which I supervise does not average over 1½% to 2% on gross sales, but we are not able to make this profit at all times and a number of stores in my district have been operated at a loss for the past two years."
>
> (Kroger R. p. 197.)

Gilbert J. Schneider, who had been an employee of the Kroger Company for sixteen years at the time he testified by affidavit, and who was supervisor over District No. 12, which covered twenty-seven counties in Kentucky, in discussing Kroger earnings in his district, said:

> "Each store operates on a basis of a small margin of profit which is not over 1½% to 2% on gross sales."
>
> (Kroger R. p. 216.)

D. T. Petty, Superintendent of Kroger stores in the counties of Daviess, Hopkins, Henderson and Christian in Kentucky, stated in his affidavit:

> "The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss."
>
> (Kroger R. p. 232.)

Albert B. Berger, who had been engaged in the grocery business for eighteen years and was at the time he testified by affidavit superintendent having charge of 125 Kroger stores, 82 of which were in Kentucky, made the following statement as to Kroger earnings in the stores under his supervision:

"The profits from store operation in the district under my supervision which we endeavor to make is about 2% on gross sales. We are able to make a profit of 2% on gross sales, a 1% tax would take about half of this profit * * * *."

(Kroger R. p. 237.)

John E. Donohue, superintendent in charge of 49 Kroger stores in Kentucky, made the following statement in his affidavit as to the earnings in stores under his supervision:

"The profits from store operations in the district under my supervision are not over 1½% to 2% on the gross sales."

(Kroger R. p. 248.)

Chris Schumann, superintendent in charge of 62 A. & P. stores in Jefferson County, made this statement as to the earnings of A. & P. stores under his supervision:

"Profits in my territory range from 1½% to 2½% on gross sales and the 1% tax would take almost all of this profit."

(Kroger R. p. 264.)

Louie J. Jones, superintendent of 65 A. & P. stores located in Louisville, in giving earnings of stores under his supervision, said:

"Profits from the store operations in my district average between 1½% to 2% on gross sales."

(Kroger R. p. 274.)

Brack M. Ferrill, in charge of 62 stores for the A. & P. Company states:

"Profits from my store operations in the district over which I have supervision average about 1½% to 2½%."

(Kroger R. p. 283.)

Walter Wenderoth, superintendent of Kroger stores in Campbell and Kenton counties, Kentucky, gave the earnings of those stores as follows:

> "We endeavor as a general rule to make about 2% profit per $1.00 of sale and the assessment of a 1% tax would deprive us of about 50% of this profit."
>
> (Kroger R. p. 289.)

This closes the affidavit evidence presented as to the earnings of the appellant Kroger and the intervenor Great Atlantic & Pacific Tea Company. It is certain that these witnesses state the earnings of their respective companies at the lowest possible figure consistent with the truth. These witnesses appeared to have been in actual charge of the stores under them, most of which were located in Kentucky, and the lowest earnings reported by any of their stores was 1½%. They directly contradict the evidence of Mr. Morrill, President of the Kroger Company, as to the earnings of the Company. Mr. Morrill testified that corporation and other license taxes to which the Kroger Company would be entitled to take credit under Section 4 would amount to about $50.00 per store. Thus it will be seen that when Kroger takes credit for the corporation and special license taxes its tax rate under the act will amount to little in excess of 75/100 of 1%.

It takes no argument to show that as applied to Kroger and the Great Atlantic & Pacific Tea Company under this evidence the tax is not confiscatory. Moreover, Mr. Morrill, after discussing the economic period covered by the years 1927, 1928 and 1929, said:

> "The crash in these values occurred in September 1929. This was the first one. Another one occurred in October 1929, and a third during the next summer. Values varied thereafter causing disorganization and chaos in business generally. With comparatively few exceptions business profits disappeared in retail business after the crash in the fall of 1929,

> many of the larger companies got into the red and went into the hands of receivers. A large number of the smaller grocery chains went into receivership and their assets melted away."
>
> (Kroger R. p. 382.)

This is a striking statement as to the condition of retailing business during the years 1930 to 1932, when the witness claims that Kroger made little profit. It is well to look to the earnings of the Kroger Company during the first six months period of 1933. Mr. Morrill says:

> "The percent of profit to the sales was 2.49. The Kroger Company business was much more profitable for the first six months of 1933 than it was for the same period of 1932, the increase in profits being $929,749.17."
>
> (Kroger R. pp. 391-392.)

The Court's finding of fact No. 2 on appellants' claim of confiscation finds that the experience of the Kroger Grocery & Baking Company for the years involved is not typical of the experience of the class taxed, nor of any subdivision of such class. (Kroger R. p. 151.) Appellants complain of this finding and make the statement there is no basis in the record for the finding of the Court. We quote from Mr. Morrill's evidence upon which the finding was made:

> "The rate of profit at which the company earned in 1930 and 1931 was somewhat lower than the rate of profit earned by the average grocery store chain."
>
> (Kroger R. p. 381.)

The majority opinion of the lower Court makes a correct statement of the rule that the Legislature in levying a tax is not required to make inquiry as to whether the taxing statute will impose the tax upon some business that will make little or no profit. We quote from the opinion:

> "The test is: What is its effect generally upon the

class taxed, or what is the effect generally upon any branch or subdivision of that class?"

(Kroger R. p. 117.)

If the rule were otherwise and the State was required to follow a taxing policy which at no time would tax any business that is making little or no profit, then the power of the State to tax would be destroyed.

In speaking of the margin of profit upon which large scale merchandising firms such as Kroger was built, Mr. Morrill testified:

> "The Kroger Company and all similar businesses are built on an extremely small margin of profit, the percentage varying from a red figure to 2.50% or 3.8%, the latter figure being the exception."
>
> (Kroger R. p. 377.)

When we apply the rule that a taxing statute is to be considered as to its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of a class to the evidence which we have quoted, it is apparent that the repeated charge of confiscation made by counsel for appellants has no foundation in this record.

It is proper at this point to examine the evidence as to the claim of confiscation as it relates to the other appellants and intervenors. The affidavit of Robert J. McKim, President of the appellant Stewart Dry Goods Company, in narrative form, is found in Kroger Record pages 297 to 319, Stewart Record pages 70 to 81. An examination of this voluminous affidavit made by the President of appellant company nowhere suggests or intimates that the tax levied by the challenged act is confiscatory as to the Stewart Company. He nowhere mentions the earnings of this company and does not state that the payment of the tax would result in a loss to his company or even be oppressive.

The appellant J. C. Penney Company operates a large

number of stores in Kentucky, but it has not presented a single statement of evidence as to its earnings or that the tax as applied to it is confiscatory or even burdensome.

What we have said of the Stewart Company and J. C. Penney Company is equalley true as to the appellant Levy Brothers. The affidavit of Fred Levy, Senior member of appellant Levy Brothers, may be found on pages 319 to 324 Kroger Record.

It is charged in the bills of complaint that the Kroger Company, Stewart Dry Goods Company, Levy Brothers and J. C. Penney Company each sue as a representative of their particular class. There is no effort on the part of the three classes represented by Stewart, Penney and Levy Brothers to show that the tax applicable to the classes which they represent is confiscatory. They do not even suggest that the tax as applied to them or their class is oppressive. The only effort to support the charge of confiscation is made by Kroger and the class which it represents. As we have pointed out from the evidence of the officials and representatives of the appellant Kroger Grocery & Baking Company and the intervenor Great Atlantic & Pacific Tea Company, the earnings of the class which Kroger represents far exceed the amount of the tax and there is no showing that the tax is confiscatory as to the class which Kroger represents.

Much of the evidence presented here on the question of confiscation was before the Kentucky Court of Appeals in the case of Moore vs. State Board of Charities and Corrections, 239 Ky. 729, 40 S. W. (2d) 349. The Kentucky Court in denying that the tax levied by the challenged act was confiscatory, said:

> "Nor does the evidence show that taken as a whole there is any confiscation arising out of the imposition of this tax. Excluding special license, excise, and corporation license tax cases, the effective rate on total gross sales expressed in fractions of 1 per cent. rises from .05 in cases of gross sales not exceeding $400,000 to .305 where such sales amount to $1,000,000. The per-

centage is .6525 where the gross sales amount to $2,000,000, but, from this point on, the curve of increase begins to flatten out. For $3,000,000 of gross sales, the percentage is .7683; for $4,000,000 it is .8263; for $6,000,000 it is .8842; for $9,000,000 it is .92278, and for $12,000,000 it is .94208. The evidence discloses that the average amount of profit in the case of these large retailers as a class (and we must gauge the law by how it operates on the class, not on some special individual, whether good or ill for him) is not less than 2 to 2½ per cent. of gross sales. It is highly doubtful under the evidence in this case whether the large retailer, because of his lower sales prices which he charges the public, cannot pass the tax laid upon him by this act on to the consumer and still be able to meet the competition of the small retailer and speciality store. The burden is upon him who attacks the constitutionality of a law, and it devolved upon appellant to show that the tax could not be shifted. But even if it be conceded that the tax must fall upon the large retailer, yet it cannot be said that, in the light of the percentage of profit per gross sales, this tax which, for practically all of these large retailers, will vary between the limits of .6525 and .94208, is confiscatory. It is not as large in the higher brackets as is the income tax levied by the United States government, and in the lower brackets it closely approximates such federal taxes. Indeed, the evidence shows that whether considered from the point of view of the ratio of profit before gross sales tax to net worth as compared with the ratio of profit after gross sales tax to net worth, or the per cent. earned on property investment in Kentucky before the gross sales tax as compared with such per cent. after the gross sales tax or the per cent. earned on invested capital before the gross sales tax as compared with such percentage after the gross sales tax, the ratio of decrease caused by the operation of the gross sales tax is just about the same. Except in the case of one large chain store, the decrease in the cases of representative large retailers does not exceed the difference between the ratio of 32.67 per cent. and that of 21.58 per cent. The application of the gross sales

tax to these representative retailers leaves the largest scale enterprises still earning on the average 12.49 per cent., the second largest scale 11.61 per cent. and the third, 9.74 per cent. This is far from confiscation."

It was asserted in the Moore case that the challenged act was confiscatory and for that reason violated Section 181 of the Kentucky Constitution and the Bill of Rights. The Court laid down the rule that the act could not be declared invalid because its operation resulted in the confiscation of the property of some particular individual, but must be tested by its operation on the class affected. It is not required that the Legislature in levying a graduated tax must inquire as to the ability of every group within the class to pay the tax without sacrificing profits. The last word on this subject is the language of this Court in the case of Fox vs. Standard Oil Company of New Jersey, decided on January 14, 1935. Mr. Justice Cardozo, writing for the Court, said:

> *"We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits.* The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict."
> (Italics ours.)

### (b) Classification

It is also urged by appellants that the challenged act violates Section 181 of the Kentucky Constitution and the Bill of Rights for the reason that the classification is arbitrary.

The evidence presented by appellees to sustain the classification has been discussed at length in answering the contention of appellants that the classification in the chal-

lenged act is arbitrary and denies to them equal protection of the law under the Fourteenth Amendment to the Federal Constitution. It is unnecessary to again review this evidence.

The rule adopted and followed by the Court of Appeals of Kentucky with reference to equality and uniformity is the same as that approved and followed by this Court. All that is required is that the tax apply equally and uniformly to all persons similarly situated. The Kentucky Court of Appeals in the Moore case, supra, sustained the classification in the challenged act both on the authority of Kentucky and Federal cases. Mr. Justice Dietzman, speaking for the Court said:

> "*The power of classifying taxes upon business according to the volume of business done has always been upheld by this court.* Thus in Gordon v. City of Louisville, 138 Ky. 442, 128 S. W. 327, 328, we said: 'In this state we recognize as valid the imposition of license taxes based upon three theories; one being a uniform tax upon all persons engaged in the same business without any reference to the amount of business done, another that levies a uniform tax upon the volume of business done without changing it in the proportion that the business increases, the per cent. being the same whether there is realized from the business $1,000 or $100,000 per annum. And yet another is the division of a general class, as in this case and the Strater Case (117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717) into separate classes according to the volume of business done, and the imposition of a different tax upon each division into which the class is divided. This last-mentioned scheme is, of course, open, as are all the others, to the objection of inequality; but the inequality is not any greater under this system than it is under the others. *Of course, in selecting the line that divides the general class into subdivisions and taxing persons coming within the provisions of each subdivision a different rate, the divisional lines are necessarily arbitrarily selected by the authorities having power to enact the tax laws as*

*is the tax that those in each division shall pay. But this fact alone is not sufficient to condemn the act as an unwarranted exercise of legislative authority, if the tax levied upon each class is reasonable, and the lines dividing the class appear to have been made with reasonable regard for the rights of the persons engaged in the business that is thus divided.'* To the same effect are Young v. City of Lexington, supra; Strater Brothers Tobacco Co. v. Commonwealth, 117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717; Clark v. City of Titusville, 184 U. S. 329, 22 S. Ct. 382, 46 L. Ed. 569; and Metropolis Theater v. City of Chicago, 228 U. S. 61, 33 S. Ct. 441, 57 L. Ed. 730.

"The state having, under the authorities, the right to classify in its taxation program and even to discriminate in favor of certain classes if the discrimination be founded upon a reasonable distinction, and classification according to the volume of business done being valid because based upon a reasonable distinction, if the tax levied be not confiscatory and the lines dividing the classes appear to have been made with reasonable regard for the rights of the persons engaged in the businesses that are thus divided, let us now turn to the evidence herein adduced to see if the conditions upon which such a classification may be validly based are fulfilled in this case. It is true the witnesses for the appellants say that the large retailer, whether operating chain stores, a department store, or just a specialty store, is in intense competition with the smaller dealer, but they do not successfully combat the evidence of the appellees to the effect that advantages in unified and superior management, manifesting itself in lower operating costs, greater efficiency in purchasing, buying for cash and thus obtaining cash discounts, warehousing goods, and distributing from a single warehouse to numerous stores, thus involving less liability for ad valorem taxes (since, as in the case of chain stores, there is no need for such a stock in any one store to be on hand on the assessment date as is required in an independent store) pricing and sales policy; greater rapidity of turnover, less advertising costs per store or department—all are those which the large retailer enjoys to his profit and which the small

retailer does not enjoy. These advantages manifest themselves in both gross and net profits. Thus the proof establishes that the ratio of net gain either to sales or to capital invested is very much higher in the case of large-scale merchants than in that of the small-scale ones whether the large-scale ones be of the chain store type or of the department store type, or even of the specialty store type.

"It is true that, in the case of department stores, appellant's witnesses state that each department is in competition with small independent dealers who will not have to pay the gross sales tax, whereas the department's sales, because of being added to the sales of other departments, will have to bear its proportion of the gross sales tax, thus putting such department at a disadvantage in its competition with the independent dealer. *But these witnesses overlook the advantages which the proof discloses that a department has in location of the store of which it is a department, its sharing with the other departments of overhead, of purchasing power, of obtaining discounts for cash, of advertising, of window display, of unified and superior management, all or most of which the average specialty store does not enjoy. The evidence further establishes that the small retailer pays a very much higher ad valorem tax per dollar of sales than does the larger merchant, and that the imposition of the gross sales tax graduated as it is tends to equalize as between the small and large retailer the tax burden per dollar of sales. The moderate amount of the graduated increase per class in the tax from one-twentieth of 1 per cent. in cases of sales of $400,000 or less to 1 per cent. of sales in excess of $1,000,000, being an increase of but two-twentieths of 1 per cent. for each additional $100,000 of sales after $500,000 can not in the light of the evidence herein produced as to the increased ability to pay in proportion to greater volume of gross sales made be said to be arbitrary, or made without reasonable regard for the rights of the persons engaged in the classes thus divided. Indeed, the percentage of graduated increase in the tax is not as great as that sustained in Clark* v. *City of Titusville, supra. In the case of City of Newport* v. *Frankel, 192 Ky. 408, 233 S. W. 884, relied upon by appellants, with but an increase of 5 cents in the admission to theatres*

*of a stated seating capacity, the license tax jumped from $450 to $5,000. Obviously such a jump could not be justified by the small increase in the price of admission. But here the jump amounts to but two-twentieths of 1 per cent. for each $100,000 of increase of gross sales. There is no such manifest injustice in this advance as there was in the Newport Case. The evidence supports the advance.''*

(Italics ours.)

What was said here is a complete answer to the claim that the classification in the act is arbitrary.

The Moore case was not the first occasion the Kentucky Court had to deal with the power of the Legislature under the Kentucky Constitution to tax according to the volume of business done. In the case of Gordon v. City of Louisville, 138 Ky. 442, 128 S. W. 327, the court said:

"In this State we recognize as valid the imposition of license taxes based upon three theories: one being a uniform tax upon all persons engaged in the same business, without any reference to the amount of business done; another that levies a uniform tax upon the volume of business done without changing it in the proportion that the business increases, the percent being the same whether there is realized from the business $1,000.00 or $100,000.00, per annum. And yet another is the division of the general class, as in this case and the Strater case, into separate classes according to the volume of business done, and the imposition of a different tax upon each division into which the class is divided. This last-mentioned scheme is, of course, open, as are all the others, to the objection of inequality; but the inequality is not any greater under this system than it is under the others. *Of course in selecting the line that divides the general class into subdivisions and taxing persons coming within the provisions of each subdivision a different rating, the divisional lines are necessarily arbitrarily selected by the authorities having power to enact the tax laws as is the tax that those in each division shall pay. But this fact alone is not sufficient to condemn the Act as an unwarranted exercise of legislative authority, if the tax levied upon each class is reasonable, and the*

*lines dividing the class appear to have been made with reasonable regard for the rights of the persons engaged in the business that is thus divided.* . . . . The first object in the minds of the legislative body was to tax all merchandise brokers. As a secondary consideration there came up the propriety of dividing them into classes based upon the volume of business done and this classification was manifestly suggested by the fact that the broker who did a small business should not be taxed as much as the one who did a large business. And so the class was divided into divisions, and a different but not unreasonable tax imposed upon each division. The requirement that the broker who does a large business should be required to pay a heavier tax than the broker who does a small business is neither unreasonable nor unjust. And to divide them into classes based on the volume of business done did not, in our opinion, violate the rule of uniformity or reasonableness that has often been applied in cases like this."

(Italics ours.)

The Court of Appeals of Kentucky, speaking through Judge Carroll, in the case of Hager, Auditor, v. Walker, 128 Ky. 1, 107 S. W. 254, approved the principle of classification based on volume in this language:

> "The power to tax according to the volume of business done has been upheld by this Court in *Strater Brothers Tobacco Co.* v. *Commonwealth*, 117 Ky. 604, 25 Ky. Law Rep. 1717, 78 S. W. 871, and here again the principle of uniformity was applied, the Court saying: 'We do not think the tax is lacking in the quality of uniformity. It is the same on each person or corporation which manufacture the same quantity of tobacco. The Legislature had the right to impose a graduated license tax. The larger manufacturer is required to pay more than the small one, based upon value of the product manufactured.' "

The language of the Kentucky Court in these cases is a complete answer to all the reckless statements of counsel for appellants that the classification of the challenged act violates Section 181 of the Kentucky Constitution and the Bill of Rights.

## IV

## APPELLANTS' BRIEF ANALYZED

No effort will be made to answer every argument found in brief for appellants. Many of the assertions in the brief are so ridiculous as to merit no consideration. Their brief will be discussed in the following order: (a) nature of tax; (b) the Moore case; and (c) theory upon which the act is challenged.

### (a) Nature of the Tax

These cases have been pending for more than four years. They have been considered twice by the District Court, once by this Court. The bills of complaint treated the challenged tax as one levied upon retail merchants for the privilege of engaging in business. (Kroger R. pp. 21-23.)

During the trial of the cases in the lower court the appellants and their counsel treated the tax as one levied upon merchants for the privilege of engaging in business. On page four of the brief filed in this Court on the former appeal they said "the tax levied by the challenged act is an excise or license tax on retail merchants." We quote their language:

> "The Act by its terms relates to 'revenue and taxation' and is an excise or license tax on retail merchants. The tax is laid upon 'the opening, establishing, operating or maintaining any store or stores.' The amount of tax is determined by computing the tax upon the amount of gross sales."

They take the position here for the first time that the tax levied by the challenged act is not levied upon the "merchant for the right to exercise the privilege or occupation" but is levied "upon the transaction or sale measured according to the price at which the article is sold." (Appellants' brief, p. 6.)

Pages 24 to 31 of appellants' brief are devoted to their contention that the tax imposed by the challenged act is a sales tax levied upon the articles sold by appellants and intervenors. The Court of Appeals of Kentucky in the Moore case, supra, discussing the nature of the challenged tax, said:

> "The tax levied by the act is by the terms of the act itself an excise or license tax imposed upon retail merchants for 'the opening, establishing, operating or maintaining' any store or stores as defined in the act, the tax being measured by the amount of gross sales and being graduated as the amount of such sales increases."

The challenged act levies a license tax for the privilege of doing business. Such a tax is often referred to as an excise tax, as are all forms of taxation which are not burdens laid directly upon persons or property. Shanks v. Kentucky Independent Oil Co., 225 Ky. 303; 8 S. W. (2d) 383.

Appellants' contention that the act levies a sales tax upon the articles sold by them is worthy of no consideration, except to show how their counsel have shifted from one position to another throughout this litigation.

### (b) Moore vs. State Board of Charities and Corrections, 239 Ky. 729, 40 S. W. (2) 249.

Many pages of appellants' brief are devoted to an attack upon the opinion of the Court of Appeals of Kentucky in this case. The Kentucky Court sustained the validity of the act upon every question presented to this Court in the case at bar adversely to the contention of appellants. They charge that a fraud was practiced upon the Kentucky Court by appellants and appellees and their counsel in the Moore case.

Appellants and their counsel knew of the pendency of the Moore case, and could have intervened in that action had they so desired. It did not suit their purpose, however,

to have an early adjudication of the questions raised as to the validity of the challenged act. We invite the Court's careful consideration of the opinion in the Moore case, which was written by Judge Dietzman, one of the ablest judges who has ever occupied the appellate bench in Kentucky. The opinion is sound and shows that the court gave careful consideration to every question presented here.

It is interesting to observe that several of the attorneys who represent appellants in the case at bar filed a brief, amicus curiae, with the Kentucky court, and the reported opinion so shows.

The charge of fraud and the reckless statements with reference to the opinion is worthy of no consideration except the reflection it may cast upon the attorneys representing appellants who filed a brief, amicus curiae, with the court. It was their duty as officers of the court to advise it of the alleged fraud which they now say was practiced upon that tribune. Their cry of fraud is but a smoke-screen to escape the opinion in the Moore case in which the court held that the challenged act did not violate the commerce clause of the Federal Constitution; the classification was not arbitrary but was a valid exercise of the taxing power of the state; and that the act in its operation was not confiscatory in violation of Section 181 and the Bill of Rights of the State Constitution.

The lower court held that the opinion in the Moore case "as to the meaning and scope of the act," and the holding that it did not violate the commerce clause of the Federal Constitution nor any provision of the State Constitution, was binding upon it.

The ruling by the lower court is supported by the opinions of this Court in the case of Michigan Central Railroad v. Powers, 201 U. S. 245. On pages 290 and 291 Mr. Justice Brewer, speaking for the court, said:

> "The unconstitutionality of a statute may depend upon its conflict with the Constitution of the state or with that of the United States. If conflict in the State

> Constitution is the sole ground of attack, the supreme court of the state is the final authority, Merchants and Manufacturers Bank v. Pennsylvania, 167 U. S. 461, and cases cited in the opinion, while in the other case the ultimate decision rests with this court."

In the case of Merchants & Manufacturers Bank v. Pennsylvania, 167 U. S. 461, referred to in the Michigan Central Railroad case, the court said:

> "It is sufficient to say in reference to this contention that the decision of the supreme court of the state of Pennslyvania, sustaining the statute, is conclusive in this court as to any question of conflict between it and the State Constitution."

This court has gone even further in the consideration of taxing statutes in holding that it will give "respectful consideration" to the contemporaneous construction of an administrative agent charged with the enforcement of the statute. Fox v. Standard Oil Co. of New Jersey, decided January 14, 1935; United States v. Moore, 95 U. S. 760; Fawcus Machine Company v. United States, 282 U. S. 375.

### (c) Theory upon Which the Act is Challenged

When the act was passed the appellants and intervenors considered it a chain store tax. The bills of complaint charged that the act was passed "to restrain the unfair competition of chain stores." (Kroger R. p. 3, Stewart R. pp. 4-5.) The bills alleged that cooperative associations offer to retail merchants operating specialized stores all the facilities and advantages enjoyed by chain and department stores in the matter of "buying on a large scale, pooling of purchasing power, the ability to contract for newspaper display, store and other advertising, * * * scientific and efficient arrangement of stores, window displays, and the development of merchandising methods." (Kroger R. p. 18, Stewart R. p. 22.) A majority of the evidence presented by appellants was to sustain these allega-

tions of the bills of complaint. (Lyons affidavit, Kroger R. pp. 171-180; Bonham affidavit, pp. 185-187; Steiden affidavit, pp. 196-198; Schneider affidavit, pp. 215-217; Petty affidavit, pp. 230-232; Berger affidavit, pp. 237-238; Donahue affidavit, pp. 247-256; Ferrill affidavit, pp. 281-283; McKim affidavit, pp. 299-319; Levy affidavit, pp. 321-323; Morrill deposition, pp. 385-386). Other witnesses were presented in an effort to establish the contention of appellants and intervenors that the independent unit store has no advtantage over the department and chain store, but the witnesses named go into the question more at length than the others. This is the theory upon which appellants sought to sustain their claim that the classification was arbitrary and that the act discriminated against them.

The contention made in the case at bar by the appellants is similar to that presented in the Jackson case involving the Indiana act, the Fox case involving the West Virginia act, and the numerous other chain store cases. Such evidence having been rejected in those cases, it will undoubtedly be rejected in the case at bar.

## CONCLUSION

All members of the same class, within the same graduated levels are treated impartially and subjected to the same tax rate. The graduated feature of the act has been repeatedly sustained by this Court and by the Court of Appeals of Kentucky as not being in violation of the equal protection clause of the Fourteenth Amendment, nor of Section 181 and the Bill of Rights of the Kentucky Constitution.

Appellees have submitted the evidence of qualified economists, supported by actual operating statistics, to show that increased sales result in increased profits; that large scale merchandising firms have advantages over their small independent competitors in the standardization of equipment and display, superior management, rapid turnover, uniformity in store management, accounting methods,

unified sales policy, coordinating the diverse units and abundant capital; and, that the act equalizes the tax burden between large scale merchandising firms and their small independent competitors. This Court has repeatedly rejected the contention presented by appellants that there is no difference between large and small merchandising firms.

For the reasons herein stated, we submit that the decree of the lower court should be affirmed.

Respectfully submitted,

BAILEY P. WOOTTON
Attorney General of Kentucky
S. H. BROWN
Assistant Attorney General
FRANCIS M. BURKE
Assistant Attorney General

*Solicitors for Appellees.*

LESLIE W. MORRIS
Frankfort, Kentucky
BATSON, CARY, & WELCH
Louisville, Kentucky
*Of Counsel.*